

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA-2831-2013 (O&M)
Date of decision : 21.10.2016**

Sudhir Chaudhary

... Appellant

Versus

Surender Kumar

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. R.K. Gupta, Advocate
for the appellant.

Mr. Akshay Bhan, Senior Advocate with
Mr. Santosh Sharma, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The appellant-defendant is aggrieved of the concurrent findings of fact, whereby the suit of the respondent-plaintiff seeking specific performance of the agreement to sell dated 03.08.2004 in respect of the suit property, has been decreed by both the Courts below.

Mr. R.K. Gupta, learned counsel appearing on behalf of the appellant-defendant submits, that the appellant-defendant was the member of the registered society, namely, The Faridabad Ex-Sainik and Karamchari Co-operative House Building Society Ltd., Faridabad Extension Part-II and had, only, paid a sum of ₹ 25,000/- to the Society and rest of the consideration was required to be paid. The respondent-plaintiff had set up a agreement to sell, aforementioned, on a printed proforma.

He submits that the agreement to sell, though was admitted, but the amount allegedly agreed was ₹ 3,000 per square yard and the amount of ₹ 1,00,000/- was received, but the same was returned back, by pay order, vide letter dated 10.11.2004 (Ex.P-7). No doubt the aforementioned letter of the appellant-defendant was rebutted by the notice dated 18.11.2004 (Ex.P-8), whereby the respondent-plaintiff did not accept the pay order, but the said pay order has not been returned back. The respondent-plaintiff only indicated that the pay order can be collected at any time, in fact, the party did not intend to continue with the terms and conditions of the agreement to sell as the agreement was cancelled, yet the Courts below exercised the discretion. The readiness and willingness on the part of the respondent-plaintiff was conspicuously absent.

He further submits that that the entire amount of the plot was to be paid by the respondent-plaintiff which was not paid and therefore there was a breach of terms and conditions, thus, the suit was not maintainable as it was wanting impleadment of the proper or necessary property.

He further submits that earlier the respondent-plaintiff had filed the suit for permanent injunction on 11.04.2005, but the same, was amended in the year 2007. Once there was already a breach, nothing prevented the respondent-plaintiff to seek the relief of specific performance and therefore, the suit was liable to be dismissed under the provisions of Order 2 Rule 2 of the Code of Civil Procedure, thus, urges this Court for setting aside the findings under challenge.

Per contra, Mr. Akshay Bhan, learned Senior Counsel assisted by Mr. Santosh Sharma, learned counsel appearing on behalf of respondent-

plaintiff submits that time was not the essence of the agreement to sell and therefore, the amendment of the suit would not allow the appellant-defendant to take the plea of limitation. The agreement to sell was never cancelled. The letter dated 10.11.2004 (Ex.P7) was specifically rebutted by notice dated 18.11.2004. The agreement to sell has been proved through the statements of the attesting witnesses. The discretion has been exercised, after noticing the aforementioned fact. The readiness and willingness has also been proved to the hilt, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is no force and merit in the submissions of Mr. R.K. Gupta, for, the agreement to sell is concededly admitted. Only the question which is to be seen whether the parties had set their own hands for execution of the sale deed. The conduct of the parties would reveal that the appellant-defendant wanted to back out of the agreement to sell by returning the amount in the month of November 2004 as the defendant had not taken the steps to get the property transferred in his name as the time was not essence of the agreement to sell, therefore, the objections qua non-maintainability of the suit for injunction and the amendment would not arise as the order has become final as there is no challenge to the same as per the Order 43 Rule 1-A of the Code of Civil Procedure. The agreement to sell has been proved through the statements of the attesting witnesses of the agreement to sell, much less, payment of the earnest money. The terms and conditions of the agreement to sell would reveal that the parties had intended to enter into an agreement to sell. The

time was not kept the essence of the contract, for, the vendor had to clear of the dues of the society until and unless the same had not been done, the target date for execution of the sale deed could not have arisen. The appellant-defendant has also failed to belie the signatures on the agreement to sell. I am of the view that once the amendment has not been challenged and the suit has been converted into specific performance of the agreement, it is too late in a day to raise such plea. The readiness and willingness has also been proved to the hilt, for, the suit was filed on 11.04.2005 and the amendment so caused in the year 2007 relate back to the year 2005 in the absence of time being essence of the contract.

As regards the maintainability of the suit as it was wanting impleadment of the proper or necessary property, I am of the view that the third party to the contract cannot be allowed to be impleaded as a party in a suit for specific performance of the agreement to sell, therefore, the argument of Mr. R.K. Gupta, is totally misplaced.

There is no force and merit in the submissions of Mr. R.K. Gupta that the written statement has not been taken into consideration, but the fact remains that respondent-plaintiff had been very fair to the Court as he has not been held the copy of the letter dated 10.11.2004, rather produced from his own custody as (Ex.P-7), whereas there was exchange of correspondence between the parties and the suit had been filed 5 months thereafter, even the applicability of the provisions of Order 2 Rule 2 CPC would not come to rescue, in the absence of pleadings of previous suit.

For the foregoing reasons, I am of the view that the findings rendered by both the Courts below are based upon the preponderance of oral

and documentary evidence. No ground is made out for interference, much less, no substantial question of law arises for determination.

Accordingly, the appeal is dismissed.

21.10.2016
Yogesh Sharma

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No